OCTOBER TERM, 1996

GUY E. ADAMS, *et al.*,
Petitioners,

v.

CHARLIE FRANK ROBERTSON and LIBERTY NATIONAL LIFE INSURANCE COMPANY,
Respondents.

On Writ of Certiorari to the Supreme Court of Alabama

BRIEF FOR RESPONDENT CHARLIE FRANK ROBERTSON

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QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment confers on class members subject to a state court's jurisdiction an absolute right to opt out of a properly certified class action, where the relief sought and won for the class is predominantly equitable and where the primary basis for the request to opt out is the objecting class members' desire to pursue separate awards of punitive damages.

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JURISDICTION

As discussed in Part I of the Argument, petitioners failed to raise their current federal claim in the Alabama Supreme Court and that court did not address the issue. This Court has indicated that such a failure to preserve a federal claim in an action coming from state court may present a jurisdictional bar to review here. *See, e.g., Yee v. City of Escondido*, 503 U.S. 519, 533 (1992).

STATEMENT

In this class action in Alabama state court, the plaintiff, respondent Charlie Frank Robertson, alleged that the defendant, respondent Liberty National Life Insurance Company, had engaged in a centrally orchestrated effort

to defraud the more than 400,000 holders of its cancer insurance policies into exchanging their existing policies for new ones that provided more limited coverage. The court certified a class of all affected insureds pursuant to Alabama Rule of Civil Procedure 23(b)(1) and (2) and, after extensive negotiations, the parties proposed a class settlement that provided a combination of injunctive relief, including extensive policy reformation, for the whole class and monetary relief, including full restitution of lost benefits, for class members who suffered substantial injuries. The settlement ensured that *all* members of the class would have insurance coverage as broad as, and in most instances broader than, the coverage they would have received absent the alleged fraud. It provided a direct financial benefit to all class members by temporarily freezing Liberty National's premium rates. Finally, it gave to those class members who actually were denied benefits because they had switched to the new policies both full restitution and supplemental monetary relief.

The settlement was nevertheless met with objections by approximately 1000 class members, or about 0.25% of the policyholders in the class. Although almost none of these objectors claimed to have suffered more than modest out-of-pocket losses (through payment of higher premiums) as a result of the fraudulent conversion of their insurance policies, they complained that they should have been allowed to opt out of the class and pursue individual lawsuits seeking damages for mental anguish and punitive damages. The trial court denied all requests to opt out but carefully scrutinized the proposed settlement and conditioned its approval on Liberty National's acceptance of changes that secured additional benefits for the class.

On appeal, the Alabama Supreme Court unanimously rejected the objectors' arguments that the denial of an opportunity to opt out violated their right to a jury trial under the Alabama constitution and that the settlement was not fair. Petitioners' current claim—that the Fourteenth Amendment's Due Process Clause gives them a right to

opt out—was not raised in petitioners' briefs, or oral argument, and was not addressed by the court.

The Liberty National Exchange Policy. From 1969 until the early 1980s, Liberty National issued a series of "cancer insurance" policies, most of which were "guaranteed renewable for life" subject to rate increases. Joint Appendix ("J.A.") 564. Many of these policies provided, among other benefits, for unlimited reimbursement of radiation, chemotherapy, and prescription drug expenses incurred in connection with treatment for cancer. J.A. 564-65.

Beginning in 1986, Liberty National introduced a series of so-called "new" policies and initiated a company-wide program designed to encourage holders of the "old" policies to "switch" to these new policies. J.A. 567-69. The new policies provided a number of significant benefits that the "old" policies did not offer, but eliminated coverage for certain prescription drugs and introduced daily and annual monetary limits for coverage for radiation and chemotherapy expenses. J.A. 567-68, 772-95, 796-815.

The Robertson Action. On October 2, 1992, respondent Charlie Frank Robertson amended an unrelated complaint against Liberty National pending in Barbour County Circuit Court to include claims that Liberty National had defrauded him and a class of cancer policy insureds through a "pattern or practice" of exchanging or attempting to exchange "old" policies for "new" policies that offered benefits that were "much less" extensive. J.A. 37-38.[1] The prayer for relief requested "an adjudication by the Court relating to the cancer policies being switched"; judgment "for the full amount of injuries and

[1] Robertson's initial complaint set forth an unrelated claim relating to Liberty National life insurance policies, *see* J.A. 31-33; this claim was later settled. *See* J.A. 92. The trial court found that the disposition of the life insurance claim was "arms-length" and "in no way impugns the integrity of negotiations" in the cancer policy class action. Petition Appendix ("Pet. App.") 28a.

damages suffered by the members of the class"; "injunctive relief as deemed necessary by the Court," and other relief. J.A. 39. An accompanying motion sought class certification under Alabama Rules of Civil Procedure 23(b)(1), (b)(2), and (b)(3). J.A. 42-43.[2] Robertson later filed a second amended complaint in which he additionally sought restitution for persons who had had claims denied as a result of the fraud and requested that the "new" policies be reformed to "provide all the benefits of the 'old policy' as well as additional benefits first included in the 'new policy'." R. 220C-22C (docket entry listed at J.A. 4).

[2] Before certification of the class, class counsel filed three separate suits in Barbour County Circuit Court on behalf of a total of six individual Liberty National cancer policy insureds. *See Peel v. Liberty Nat'l Life Ins. Co.*, No. CV-92-055 (filed October 6, 1992; motion of Jere L. Beasley to withdraw as counsel granted February 23, 1994; dismissed with prejudice April 28, 1994); *Gould v. Liberty Nat'l Life Ins. Co.*, No. CV-93-024 (filed March 9, 1993; plaintiffs' "Request for Dismissal and Inclusion in Class Action" granted February 14, 1994); *Stewart v. Liberty Nat'l Life Ins. Co.*, CV-93-025 (filed March 10, 1993; dismissed without prejudice July 19, 1993). *See also* J.A. 45, 79, 82, 86.

Petitioners and their *amici* would make much of these three lawsuits, *e.g.*, Petitioner's Brief ("Pet. Br.") 27-28, but none of these separate actions had the purpose or effect of favoring individual clients over the class. The *Peel* case was filed four month before class certification in this action. Class counsel Beasley did not believe Ms. Peel to be within the definition of the class, see Fairness Hearing Tr. 807, 811-12, but *withdrew* from representing her well before judgment in either *Peel* or *Robertson*. Two *Stewart* plaintiffs (former Liberty National executives) testified at the fairness hearing that their actions were filed because of uncertainty about the scope of the class definition in *Robertson*. Fairness Hearing Tr. 311, 363-64. The *Stewart* action, and the *Gould* action as well, were voluntarily dismissed prior to the approval of the settlement of the class action. The plaintiffs thereupon became members of the *Robertson* class and are *bound by the settlement no less than other members of the class*. Petitioners' aspersions against class counsel, echoed by *amici*, ignore these facts, are thus entirely unfair, and do not call into question the trial court's findings that class counsel zealously pursued the interests of the entire class. *See* Pet. App. 28a, 32a, 34a, 36a-37a, 50a, 71a, 82a-83a, 90a.

Class Certification. On October 16, 1992, the court held a hearing on class certification. Liberty National opposed the motion for certification and requested a continuance to pursue discovery. J.A. 50-74. On March 8, 1993, at the next hearing on the issue, Liberty National renewed its opposition to certification. J.A. 74-75. On March 10, 1993, however, the trial court certified a class under Rule 23(b)(2) of the Alabama Rules of Civil Procedure consisting of all persons who, on or after August 29, 1986, were insured under Liberty National cancer policies providing unlimited coverage for radiation, chemotherapy, and out-of-hospital prescription drugs, excluding persons who had filed their own suits prior to March 10, 1993. J.A. 89-90. Certain members of the class thereupon objected, intervened, or both, challenging the certification and mandatory nature of the class. *E.g.*, J.A. 93, 96, 99, 107.[3]

The Proposed Settlement. The parties engaged in lengthy settlement negotiations after the certification, Petition Appendix ("Pet. App.") 36a, and on June 16, 1993, they filed an executed settlement for the court's approval. J.A. 127-65. The proposed settlement provided a broad array of benefits to the class. *See* Pet. App. 39a-40a (trial court's summary). It provided that: the policies of class members who had "switched" from old to new policies would be reformed so as to restore all the coverage provided in the old policies *in addition to* the expanded benefits provided in the new policies, J.A. 141-42; policy-

[3] After certification, various parties attempted to bring separate actions challenging Liberty National's cancer policy exchange program, *e.g.*, J.A. 110, including a new class action raising "virtually identical" claims filed by objectors in the circuit court of Mobile that was ultimately stayed by the Alabama Supreme Court due to the Barbour County court's prior assertion of jurisdiction in the *Robertson* action. *See Ex parte Liberty Nat'l Life Ins. Co.*, 631 So. 2d 865, 868 (Ala. 1993).

holders whose "old" policies lapsed after the institution of the exchange program would have the option of reinstating their old policies, without payment of past premiums and without regard to present insurability, J.A. 139-40; class members' claims experience would be "pooled" for rate filing purposes, J.A. 143-44; [4] and premiums on "old" and "new" policies would not be increased by Liberty National before January 1, 1995. J.A. 144. The agreement also included injunctive relief against any future fraudulent switching of policies.

The settlement provided three distinct monetary remedies for class members who had "switched" from old to new policies, contracted cancer, and suffered a loss of benefits.[5] First, it guaranteed complete restitution of any net reduction of overall benefits to which these class members would have been entitled under the old policies, and established a claims procedure to identify eligible class members. J.A. 145. In addition, a $1,000,000 "Incidental Monetary Settlement Fund" was to be distributed among class members who had submitted claims for radiation, chemotherapy, or prescription drugs that were not fully covered under new policies. J.A. 144-45. A $3,000,000 "Supplemental Extracontractual Monetary Relief Fund" was to be distributed among those entitled to restitution. J.A. 149-50.

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[4] The pooling remedy, one of several important types of relief in the settlement that petitioners *never acknowledge* in their brief, was designed, among other things, to address claims that Liberty National's policy exchange program had distorted rates by diminishing the risk pool upon which some class members' premiums were based.

[5] Petitioners contend that there is "no logical explanation" why "only this limited group" received monetary relief under the settlement. Pet. Br. 26. But it was clearly appropriate to allocate the monetary relief to those class members who had actually had cancer claims denied because of the benefit limits in the new policy; other class members' injuries were far more attenuated, and were fairly compensated by the various forms of equitable relief provided in the settlement. *See, e.g.*, Pet. App. 15a-16a.

The agreement was contingent upon the trial court's approval of "a Rule 23(b)(2) mandatory class with no right to opt out," and a final court order barring class members from filing new claims based on Liberty National's cancer policy exchange programs. J.A. 151, 159. It provided for Liberty National to pay class counsel's fees, in an amount to be determined by the court not to exceed $4.5 million. J.A. 154-55.[6]

Based on extensive actuarial testimony, the trial court later found that the pecuniary value of the proposed settlement agreement as proposed—not counting "certain other valuable injunctive and equitable benefits" that were "not measurable pecuniarily"—was at least $39.4 million. Pet. App. 41a.

The Fairness Hearing. On June 16, 1993, the trial court preliminarily approved the proposed settlement, "reaffirm[ed]" its certification of the class action under Alabama R. Civ. P. 23(b)(2), and set a date for a fairness hearing pursuant to Rule 23(e) to be held after individualized notice to the class. J.A. 168, 170, 171-73, 177. In anticipation of the hearing, the court later ordered class counsel to produce to objectors all Liberty National documents relied upon by class counsel in evaluating the company's settlement proposals and all transcripts of depositions taken in the case, and to make available for a deposition the actuarial expert class counsel had retained to evaluate the case and the settlement. *See* Pet. App. 47a-48a. After notice to the class, only 707 class members—less than one-quarter of one percent of the policyholders in the class—filed written objections prior to the October 1993 deadline. J.A. 622-43. The court agreed to entertain the arguments of another 301 objectors filed after the deadline. J.A. 644-49.

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[6] In the Alabama Supreme Court, petitioners did not challenge the reasonableness of the court's ultimate award of $4.5 million in fees payable by funds separate from the relief provided to class members, *see* Pet. App. 40a. The award was amply supported by testimony from class counsel and by expert testimony.

The fairness hearing was held on January 20, 21, and 24, 1994. The court heard extensive testimony, including testimony from any objector who wished to appear, and received a large volume of documentary evidence. *See* Pet. App. 24a-27a. After the hearing, respondents jointly moved for an order certifying the class for settlement purposes under Alabama Rules of Civil Procedure 23(b)(1)(A), 23(b)(1)(B) and 23(b)(2). J.A. 386-87.[7]

Conditional Approval of the Settlement Subject to the Court's Modifications. On February 4, 1994, the court filed an order and judgment conditionally approving the settlement and granting the motion to certify the class under Rules 23(b)(1)(A) and 23(b)(1)(B) as well as Rule 23(b)(2). *See* J.A. 394-95. The court found that "if this action were not maintained as a class action, Liberty National could very likely be placed under inconsistent directives," such as conflicting orders to reform the new policy or injunctions requiring "pooling" of policy groups. J.A. 395. The court also found that the assets of Liberty National were a "limited fund" subject to exhaustion in the event of lawsuits by even a small percentage of the 400,000 cancer policyholders in the class, especially by multiple actions seeking punitive damages. J.A. 395-96.

The trial court concluded "that the settlement, if modified in certain respects, is fair, reasonable and adequate and ought to be approved." J.A. 398.[8] The required modifications included substantial increases in all three forms of monetary relief: the restitution due class members who had experienced an overall reduction in benefits would increase from 100% to 150%; the "Supplemental" fund would increase from $3,000,000 to $9,000,000, and the "Incidental" fund would increase from $1,000,000 to $2,000,000. J.A. 398-99. The court further demanded that: (1) the premium freeze provisions of the proposed settlement be extended; (2) future premium increases for any class members be limited so that the increases could not yield expected loss ratios below 55%, so as "to remove any opportunity for Liberty National to recover the costs of this settlement through future rate increases"; (3) class members holding "old" policies be given the opportunity to obtain "new" policies (as reformed by the settlement to include the benefits of the old policies as well); and (4) the reformation provisions of the agreement providing expanded benefits be deemed to relate back to June 16, 1993. J.A. 400-01.

[7] The trial court characterized this motion as "essentially a request for an amendment seeking to conform the class certification to [the] evidence actually submitted at the Fairness Hearing." J.A. 394.

[8] The court explained that it had imposed the modifications not because the settlement as proposed was unfair to the class, but to ensure "sufficient punitive equitable and monetary relief against Liberty National to effectively remove and exceed all profits or gain made by Liberty National from the exchange of class members' policies." Pet. App. 51a-52a.

Final Approval of the Settlement. After the class representative and Liberty National accepted these modifications, the court, on May 26, 1994, entered its order and final judgment approving the settlement agreement as modified, Pet. App. 93a-106a, together with extensive findings of fact and conclusions of law, *id.* at 21a-92a. The court found that class counsel had "vigorously bargained for the best possible settlement and ha[d] ultimately obtained a settlement which this Court finds to be fair and reasonable to all members of the class." Pet. App. 37a.[9] The court concluded that the total value of the revised settlement—$55,000,000 excluding unquantified equitable benefits including the cap on premium increases and common pooling—was "well within the reas-

[9] The court rejected the objectors' contentions—renewed in this Court, *see* Pet. Br. 8 n.7—that the case had already been settled at the time the class was certified. Pet. App. 33a. The court noted that it had closely supervised negotiations after certification and that the "negotiations were conducted at arms-length, without collusion, and were the result of hard and intense bargaining by able counsel on both sides," Pet. App. 34a. *See also id.* at 36a.

onable range of recovery for this action, even if one were to disregard the substantial risks of this litigation." Pet. App. 65a.[10] It further found that "both the expense and likely duration of the litigation (but for the settlement) would be great." Pet. App. 66a.

Turning to the objectors, the court observed that opposition to the settlement was "not substantial when compared to the size of the class," Pet. App. 67a, and stated that no "class member has provided a sound, objective reason for denying approval of the settlement, nor suggested any other reasonable form of settlement which would adequately address the interests of all class members." Pet. App. 68a. The court acknowledged that some class members complained about having to continue to do business with Liberty National to benefit from the settlement, but found that the reformation of the policies to give class members all the benefits offered under *both* old *and* new policies was "an overall benefit which is in the best interests of the class as a whole and must prevail over the individual concerns of a few objectors." Pet. App. 69a. The court noted that the " 'best of both worlds' " coverage afforded class members under the re-

[10] The court acknowledged the *possibility* of an award worth more than $100,000.00, Pet. App. 63a, but found that the odds of such a recovery were remote. The court observed that plaintiffs would have to overcome many substantial factual and legal arguments to prevail at trial, including uncertainty over "whether the clear written disclosures on the face of the policies and sales brochures preclude any claim of fraud or nondisclosure," Pet. App. 59a, and evidence put on by Liberty National that the benefits provided under the "new" policies are considerably more valuable in the aggregate than the benefits provided under the old policies, so that the great majority of cancer sufferers would actually receive more benefits under the new policy than the old. *See* Pet. App. 61a-62a. Nevertheless, "for the purposes of deciding the fairness of the Settlement," the trial court "assumed that Liberty National engaged in a company-wide pattern or practice of fraudulent nondisclosure and misrepresentation . . . designed to induce exchanges of cancer policies by healthy insureds by any means possible." Pet. App. 31a.

formed policies was not "generally available for purchase in the marketplace." Pet. App. 69a. Finding that Liberty National's statutory net worth was $327,000,000, the court stated that "[w]ith some 400,000 named insureds (plus their additional insured family members) in the class, even an award of $1,000 each would far exceed Liberty National's statutory net worth," and that a "succession of large individual punitive damage judgments" would deplete the company's resources even more rapidly. Pet. App. 72a.

Finally, the court reaffirmed that the action was appropriate for mandatory class treatment under Rules 23(b)(1) and (2). Pet. App. 76a-77a, 83a-84a. It emphasized the danger that, if a right to opt out were permitted, there would be a "race to the courthouse by those permitted to opt-out in an effort to obtain for themselves alone the entirety of the constitutionally permissible punitive recovery in one or a few individual actions." Pet. App. 77a.[11] This scenario, the court concluded, posed "a substantial threat to the interests of the class as a whole if the merit of the claims is what plaintiff and the objectors contend, in that there is the potential for complete destruction [of] all chances of punitive or other recovery to the remaining class members, as well as a potential for loss of all insurance coverage any class members may have with Liberty National." Pet. App. 86a.

Alabama Supreme Court Review. About 400 of the class members who had intervened before the trial court appealed the certification of the class and approval of the settlement to the Alabama Supreme Court, arguing that the mandatory nature of the class deprived them of their

[11] In view of petitioners' goal of obtaining punitive damage awards that would very likely prevent a substantial classwide remedy, it is ironic that petitioners felt free to place before the Court extra-record newspaper articles (Pet. App. 122a-35a) in an attempt to besmirch the reputation of class counsel and the trial court by associating them with "ridiculously high puntive damage awards." Pet. App. 133a.

right to jury trial under the Alabama constitution; that the settlement was inadequate and the trial court had made factual errors in the course of approving it; and that the trial court had committed various errors by limiting the discovery provided to the objectors. The Alabama Supreme Court affirmed.

The court ruled that the trial court had properly certified the class under Rule 23(b)(1) and 23(b)(2), holding that "[s]o long as the relief sought is *primarily* equitable or injunctive, a class action settlement that also includes money damages with a mandatory non-opt-out provision is proper." Pet. App. 12a. It rejected the claim that the settlement denied the right to a jury trial, reasoning that the presence of the class representative in a duly certified class action ensures unnamed class members their "'day in court.'" Pet. App. 14a. Because it concluded that the trial court had properly declined to allow a right to "opt out," the Alabama Supreme Court found it unnecessary to decide whether the class would be "more appropriately certified under Rule 23(b)(1) or 23(b)(2)." Pet. App. 15a.

In response to the appellants' claim that the settlement agreement was inadequate because it failed to provide the class sufficient compensation for the higher premiums they paid for the new policies, the court noted that "the new policies contained benefits that were not part of the old policies, and the settlement adequately remedies the problem by requiring Liberty National to reform the new policies to include the benefits that had been provided in the old policies." Pet. App. 15a-16a. The court upheld the trial court's findings and conclusions in support of the settlement, and rejected the objectors' challenges to the trial court's discovery rulings. Pet. App. 17a-19a.

SUMMARY OF ARGUMENT

Petitioners, asserting that the predominant issue in this case was their right to damages based on Liberty National's fraudulent conduct, ask this Court to rule that due

process required that they receive an opportunity to opt out. Petitioners contend that the Fourteenth Amendment required the Alabama courts to allow a small percentage of the class to rush to court, capture the lion's share of the (primarily punitive) damages that could be awarded based on Liberty National's tortious exchange policy, and thereby likely destroy the chance that the rest of the class would ever receive any meaningful relief. That claim, however, is not properly presented in this case and is in any event entirely without merit.

1. Petitioners failed to raise any federal issue in the Alabama Supreme Court. In that court, the basis of their claimed right to opt out was the right to a jury trial guaranteed under the Alabama constitution. In the course of making that argument, they referred briefly to the fact that a few objectors were from outside Alabama and argued that those objectors had a due process right to opt out under *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). But they plainly avoided making their current argument that the Fourteenth Amendment guarantees a right to opt out for all class members in class actions predominantly involving money damages. The Alabama Supreme Court, in turn, never discussed any federal constitutional issue. It follows that this Court should not reach the merits of petitioners' current constitutional claim. *E.g., Heath v. Alabama*, 474 U.S. 82, 87 (1985).

2. Petitioners' sole claim is that due process guarantees a right to opt out in class actions *predominantly involving damages claims*. They do not question the constitutionality of the rule that mandatory classes should be certified in cases exclusively or predominantly involving injunctive relief. Nor could they: that rule is universally recognized and has strong roots in the practice of equity courts going back many years. *See, e.g., Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356, 367 (1921). It also makes perfect sense not to allow opt outs in a case where the primary concern is obtaining an

equitable decree to regulate the conduct of the defendant toward a group of people.

The problem is that this case—far from being predominantly a damages case—is a classic example of one where the primary relief properly sought and won for the class was *injunctive*. Although Liberty National's fraudulent conduct was widespread, that conduct had not yet caused substantial injuries to the vast majority of class members. Moreover, even a modest classwide damages remedy would have wiped out the company. The only practical way to deal with the problem was to reform Liberty National's cancer policies to restore the lost coverage, while providing restitution and supplemental monetary benefits to those few class members who had contracted cancer and thus felt the effects of that lost coverage. This simply could not have been achieved if petitioners had been left free to pursue large punitive damage verdicts at the expense of the interests of their fellow class members. Thus, even under petitioners' view of the law, it was fully constitutional to certify a mandatory class in this case.

3. Petitioners also do not question the well-accepted proposition that it is proper to certify a mandatory class in a case involving the equitable distribution of a limited fund of money. *See* Fed. R. Civ. P. 23(b)(1)(B). The trial court properly determined that this case fell into that category, reasoning that the entire assets of Liberty National—and the more limited amount of money that could constitutionally be awarded as punishment in this case—both constituted limited funds. Petitioners dispute the validity of this determination. But the very nature of their complaint about the class settlement—focusing on the denial of an opportunity to garner an inequitable share of the punitive damages potentially available to class members—demonstrates that the trial court had a legitimate basis for its decision to certify a mandatory class on a limited-fund theory.

4. In any event, the Due Process Clause does not mandate a right to opt out even in pure damages cases and even where a limited fund rationale is inapplicable.

a. This Court's ruling in *Shutts* does not support petitioners' claim. The Court there held that out-of-state class members must be given a right to opt out as a means of giving their consent to a state court's exercise of jurisdiction over them. 472 U.S. at 812. *Shutts* did not hold that procedural fairness demands a right to opt out for all class members in damages cases, and the court below plainly had jurisdiction over petitioners.

b. History also fails to support the claimed right to opt out of class actions seeking damages. While class actions were unknown at common law, equity courts frequently adjudicated class actions where the relief at stake was monetary. *See, e.g., Smith v. Swormstedt*, 57 U.S. (16 How.) 288 (1854). While these tended to be cases involving what are now called limited funds or involving equitable as well as legal relief, the fact remains that courts have long recognized the propriety of mandatory classwide adjudication of individual monetary claims, where there are common questions to resolve and adequate representation is provided.

c. Petitioners' claim also finds no support in the test for assessing procedural fairness set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976). In a class action, adequate representation is guaranteed, both by ongoing judicial supervision and by class members' right to demonstrate inadequate representation in a subsequent case raising the same claim. *See Hansberry v. Lee*, 311 U.S. 32 (1940). What petitioners are really seeking, therefore, is not a fairer process but a peremptory right of *control* over the choice of forum and over their legal representative. But once a fair process is provided, the interest in control deserves only modest weight in the due process balance.

Arrayed against that interest are the interests of other class members, the defendant, and the state in achieving an equitable and comprehensive resolution of a class of similar claims in a single forum. As this case illustrates, allowing individuals to opt out and pursue damages separately can deter settlements and often leave little, if any, relief that can be awarded to the class as a whole. As a result, the courts may be burdened with a multitude of individual cases, rather than a single proceeding. At a time when many potential methods of resolving classes of similar claims are under discussion, it would be highly unfortunate if the Court were to hold that one potentially useful mechanism, the mandatory class, is constitutionally forbidden.

ARGUMENT

I. THE QUESTION PRESENTED IS NOT PROPERLY BEFORE THE COURT BECAUSE IT WAS NEITHER PRESSED NOR PASSED UPON IN THE ALABAMA SUPREME COURT.

The constitutional issue presented here is not properly before this Court. By "longstanding rule," this Court generally declines to consider claims that were not pressed or passed upon in the state court whose judgment is under review. *See Heath v. Alabama*, 474 U.S. 82, 87 (1985); *Illinois v. Gates*, 462 U.S. 213, 218-22 (1983). Here, petitioners presented *no* federal claim in the Alabama Supreme Court. They argued there (1) that the settlement of this mandatory class action violated their right to *jury trial* under *state* law; (2) that the settlement was not fair to class members; and (3) that the trial court made various discovery errors.[12] In the course of making the first argument, petitioners briefly invoked *Phillips*

[12] These were the three issues listed in the "Issues Presented" section of the Brief of Appellants in the Alabama Supreme Court. Brief and Argument of Appellants at xxxiii. Under state law, this section limits the scope of the issues before the court. *See Eady v. Stewart Dredging & Const. Co.*, 463 So. 2d 156, 157 (Ala. 1985).

Petroleum Co. v. Shutts, 472 U.S. 797 (1985)—which they described as conferring on "non-resident[s]" of the forum state a right to opt out of a damages action. Brief and Argument of Appellants at 23, 24. However, they emphatically did not assert their *current* due process claim—that persons have a right to "opt out" of class actions seeking damages when personal jurisdiction is uncontested.

This Court has affirmed that a "vague appeal to constitutional principles does not preserve [petitioners'] . . . due process claims." *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 77 (1988). *A fortiori*, references to rights under *state* law, or citations to cases dealing with federal questions to support arguments under state law, are wholly insufficient to preserve a claim under the federal Constitution. *See id.* at 77-78 (citing *Webb v. Webb*, 451 U.S. 493, 496-98, 501-03 (1981)).[13]

Nor is this a case in which the lower court *sua sponte* addressed an issue that otherwise would have been forfeited. *Cf. United States v. Williams*, 504 U.S. 36, 41-42 (1992). The Alabama Supreme Court's opinion never so much as mentioned any federal issue. The *only* "constitutional" issue it addressed was appellants' claim that the settlement violated their state jury trial rights. *See* Pet. App. 13a-15a.

Respondent Robertson acknowledges that this problem was not raised in his brief in opposition to the petition for certiorari.[14] But before finding that this failure constituted a waiver, *see Oklahoma City v. Tuttle*, 471

[13] Out of an abundance of caution, respondents did discuss the due process issues in their own briefs. But surely a state-court appellee's unprovoked argument—ignored by the state court—that a federal right is *not* violated is inadequate to preserve a claim by the appellant based on that right.

[14] The other respondent, Liberty National, did not file a brief in opposition.

U.S. 808, 815-16 (1985), the Court would need to address the unresolved question whether a failure to preserve an issue in a case coming from a state court limits the *jurisdiction* of this Court. *See Yee v. City of Escondido*, 503 U.S. 519, 533 (1992); *Bankers Life*, 486 U.S. at 79. In any event, even if the rule requiring preservation of claims is prudential only, there are good reasons to apply it here, despite respondents' failure to raise it at the petition stage.

The due process issue presented here is of potentially great and far-reaching import. "Where difficult issues of great public importance are involved, there are strong reasons to adhere scrupulously to the customary limitations on [the Court's] discretion." *Gates*, 462 U.S. at 224. Doing so "discourages the framing of broad rules, seemingly sensible on one set of facts, which may prove ill-considered in other circumstances." *Ibid*. *See also Bankers Life*, 486 U.S. at 79. These "weighty prudential considerations," *Gates*, 462 U.S. at 224, far outweigh any inconvenience involved in dismissing the writ of certiorari and awaiting the next opportunity to address the question presented.

The pressed or passed upon rule also embodies a " 'due regard for the appropriate relationship of this Court to state courts.' " *Id*. at 221 (citation omitted). Federalism concerns are particularly acute here: had petitioners properly raised their due process challenge in the Alabama Supreme Court, that court would have had an opportunity to address an issue that distinctively implicates the interaction of the federal Constitution with state procedural rules. Thus, even if the Court has jurisdiction to reach the merits, prudence calls for dismissal of the writ.

II. EVEN ASSUMING THAT DUE PROCESS REQUIRES A RIGHT TO OPT OUT IN SOME CASES, IT WAS CONSTITUTIONAL TO CERTIFY A MANDATORY CLASS IN THIS CASE, WHERE CLASSWIDE INJUNCTIVE RELIEF WAS THE PREDOMINANT FORM OF RELIEF AT STAKE.

Petitioners, in their brief, limit their claim of a constitutional right to opt out to cases in which the *predominant* or *exclusive* form of relief at issue is money damages. *See* Brief for the Petitioners ("Pet. Br.") i (question presented is whether right to opt out is constitutionally required "when the claims extinguished by the settlement are predominately, if not exclusively, monetary damages claims").[15] They do not claim that opt outs must be permitted where classwide injunctive relief is all that is at issue—or is the predominant remedy sought by plaintiffs who also are pursuing ancillary monetary relief.[16] Petitioners' decision to focus on damages actions is hardly surprising: there is no basis in law, history or common sense for the proposition that due process requires an opportunity to opt out in cases that are exclusively or predominantly injunctive in nature. But that decision means that petitioners are presenting an argument that bears little relation to *this* case. By its very nature, this was a case where the class representative, in order to maximize the interests of the class as a whole, had to give top priority to obtaining *injunctive* relief to restore

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[15] *See also* Pet. Br. 20 ("*Shutts* established that, in order to bind *any* class member with respect to claims 'wholly or predominately' for money damages, due process requires that all absent class members be afforded the right to opt out."); *id*. at 35 ("The historical development of class actions demonstrates that the right to opt out is constitutionally mandated in a case involving claims 'wholly or predominately' for money damages.").

[16] *See* Pet. Br. 30 (citing and *distinguishing Califano v. Yamasaki*, 442 U.S. 682 (1979), *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 251 (3d Cir. 1975), and *King v. South Central Bell Tel. & Tel. Co.*, 790 F.2d 524, 529 (6th Cir. 1986)).

the insurance coverage previously available to the class *before* substantial injuries were inflicted on most class members.[17] As a practical matter, that relief could only have been obtained in a mandatory class action like the one certified here. Thus, petitioners' constitutional arguments, whatever their merit in the abstract, simply do not apply to the case at hand.[18]

A. It Has Long Been Recognized That Courts May Certify a Mandatory Class to Adjudicate Claims "Predominantly" for Classwide Injunctive Relief.

As petitioners implicitly acknowledge, there can be little doubt that it is constitutional for a court to entertain a mandatory "no opt out" class action to adjudicate a claim for classwide equitable relief. Such class actions were long entertained in courts of equity[19] and have been authorized since 1937 under both versions of Fed. R. Civ. P. 23.[20] This principle is based on the common sense

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[17] A very small percentage of the class (fewer than seven hundred insureds of the 400,000 policyholders, Pet. App. 13a) had already contracted cancer, had claims denied, and experienced potentially significant injuries. For those persons, class counsel appropriately sought and obtained full restitution and substantial monetary relief. *See* J.A. 144-45, 149-50, 398-99.

[18] The irrelevance of petitioners' "Question Presented" to this case provides an additional reason to dismiss the writ.

[19] *See, e.g., Stearns Coal & Lumber Co. v. Van Winkle*, 221 F. 590, 596 (6th Cir. 1915); *Penny v. Central Coal & Coke Co.*, 138 F. 769, 773 (8th Cir. 1905); *Gorley v. City of Louisville*, 65 S.W. 844 (Ky. 1901); *Smith v. Smith*, 18 N.E. 595 (Mass. 1888); *New York & New Haven R.R. v. Schuyler*, 17 N.Y. 592, 603-09 (1858); *How v. Tenants of Bromsgrove*, 1 Vern. 22, 23 Eng. Rep. 277 (Ch. 1681); *Brown v. Vermuden*, 1 Ch. Cas. 272 (1676). *See generally* 1 Herbert Newberg & Alba Conte, *Newberg on Class Actions* § 1.09, at 1-22 (1992); Zechariah Chafee, Jr., *Bills of Peace with Multiple Parties*, 45 Harv. L. Rev. 1297 (1932).

[20] The original Rule 23 did not expressly address the extent to which class actions of any kind would be binding on unnamed class members, but the equitable judgments rendered under the Rule were

notion that, in some circumstances, wrongs inflicted on a group can best be remedied by a generally applicable equitable decree. *See* Fed. R. Civ. P. 23(b)(2). Often, as here, there is an additional concern that multiple adjudications of equitable claims can lead to *inconsistent* decrees. *See* Fed. R. Civ. P. 23(b)(1)(A); J.A. 395.

A good example, parallel in many ways to this case, is the class decree in *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356 (1921). There, a fraternal benefit association that sold death benefits to its members had been sued in federal court by a class of members alleging that the association had created a new, less attractive type of benefit certificate and had "wrongfully . . . inaugurated a campaign to persuade and induce the members of the society" to convert to the new type. *Id.* at 359. The class suit was an equitable action seeking an injunction. *Id.* at 360-61. After the class action was concluded, a group of class members sought to relitigate the same claims. This Court held that it was proper for the federal court to enjoin the new suit, reasoning:

> It is impossible to name all of the class as parties, where, as here, its membership is too numerous to bring into court. The subject-matter included the control and disposition of the funds of a beneficial organization, and was properly cognizable in a court of equity. The parties bringing the suit truly represented the interested class. *If the decree is to be*

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almost uniformly held to be binding on the entire class. *See* 1966 Amendments to Rule 23 Advisory Committee Notes (stating that under 1937 Rule, "judgments in 'true' and 'hybrid' class actions would extend to the class (although in somewhat different ways)"); *Developments in the Law: Multiparty Litigation in the Federal Courts*, 71 Harv. L. Rev. 874, 930 (1958). The current version, of course, provides that a right to opt out need only be provided in cases certified under Rule 23(b)(3) (typically damages cases) and not in injunctive cases certified under Rule 23(b)(1) or (2). *See* Fed. R. Civ. P. 23(c)(2).

> *effective and conflicting judgments are to be avoided, all of the class must be concluded by the decree.*

Id. at 367 (emphasis added).

It is equally well established that allowing opt outs is not necessary in cases where the "predominant" form of relief at stake is a classwide injunction but there are also ancillary claims seeking individual monetary relief. *See* 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1775, at 466 n.24 (1986) (citing cases); *id.* at 470 (actions including claims for injunctive relief "usually" should proceed under Rule 23(b)(2), with other aspects of the case being treated as "incidental"); Pet. App. 12a (citing *First Ala. Bank of Mont. v. Martin*, 425 So. 2d 415 (Ala. 1982) and federal cases); *Newberg on Class Actions* § 4.14 (citing cases). "The lower courts have consistently held that the presence of monetary damage claims does not preclude class certification under Rules 23(b)(1)(A) and (b)(2)." *Ticor Title Ins. Co. v. Brown*, 114 S. Ct. 1359, 1363 (1994) (O'Connor, J., dissenting from dismissal of writ of certiorari, joined by Rehnquist, J., and Kennedy, J.) (citing Wright & Miller).[21]

This was the approach often taken in courts of equity, where the basic trend in the law was to adjudicate both equitable *and* damages claims in representative suits properly before the equity court:

> The older cases granted only the injunction and held that the claims for damages by or against numerous

[21] "If the court determines that both [Fed. R. Civ. P. 23(b)(2) and (3)] apply, then it should treat the suit as having been brought under Rule 23(b)(2) so that all the class members will be bound. To hold otherwise would allow the members to utilize the opting out provision in subdivision (c)(2), which in some cases would thwart the objectives of representative suits under Rule 23(b)(2)." Wright & Miller, *supra*, § 1775, at 491-92 (1986) (footnotes omitted) (citing cases).

> persons must be tried in separate actions at law . . . . Recent decisions . . . show an inclination to assess compensation in the unified proceeding, applying the principle that equity once having taken jurisdiction will wind up the whole controversy.

Zechariah Chafee, Jr., *Bills of Peace With Multiple Parties*, 45 Harv. L. Rev. 1297, 1329 (1932) (footnote omitted).[22]

The "predominance" test was also recognized in 1966 by the Advisory Committee that rewrote Rule 23. Discussing Rule 23(b)(2), the Committee stated:

> This subdivision is intended to reach situations where a party has taken or refused to take action with respect to a class, and final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole is appropriate. . . . The subdivision does not extend to cases in which the appropriate final relief relates exclusively *or predominantly* to money damages.

(Emphasis added.)[23]

[22] *See also, e.g., Stearns Coal & Lumber Co.*, 221 F. at 596 (equity retains jurisdiction in representative suit to allocate to stockholders proceeds from sale of corporate property recovered from defendant); *Everglades Drainage League v. Napolean B. Broward Drainage Dist.*, 253 F. 246, 252 (S.D. Fla. 1918) (inclusion of claim for damages would not prevent equity court from deciding representative suit that also sought injunctive relief on common question); *Climax Specialty Co. v. Seneca Button Co.*, 103 N.Y.S. 822, 823-24 (N.Y. Sup. Ct. 1907) (permitting class suit for injunction and damages).

[23] The same rule was implicitly acknowledged by this Court in *Shutts* (albeit in a discussion of the separate question of when an opt out is required before a state court can exercise jurisdiction over out-of-state class members not otherwise within its jurisdiction):

> Our holding today is limited to those class actions which seek to bind known plaintiffs concerning claims wholly *or*

Such a rule makes perfect sense. In many if not most cases where classwide equitable relief is sought, it would be possible for a class member to assert a claim for damages based on the same transaction or occurrence. But that cannot be enough to defeat certification of an injunctive class. Nor would it be practical in most instances to allow the class representative to pursue injunctive relief while authorizing individual class members to seek damages separately. As this case illustrates, class representatives often need control of all potential claims against the defendant in order to pursue the most effective resolution for the class as a whole. Allowing some class members to pursue damages separately would not only prevent desirable settlements, but also lead to results where the limited assets of a defendant are primarily devoted to meeting the demands of a small percentage of the class of persons equally affected by the wrongful conduct.

B. This Case Was Properly Treated as One Where the Predominant Form of Relief Was a Classwide Injunction.

Because of the predominance test, before even reaching the constitutional issue raised by petitioners, the Court would have to determine that petitioners are correct in labeling this as a case where the predominant claim was money damages. But there would be no basis for such a determination. The trial judge, whose rulings amply demonstrate his thorough familiarity with the case, properly found that "injunctive and other equitable relief is the predominant relief justified under the circumstances." Pet. App. 84a. *See* Newberg, *supra*, § 4.14, at 4.49 ("predominance" determination "is dependent on the exercise of sound discretion by the court").

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predominately for money judgments. We intimate no view concerning other types of class actions, such as those seeking equitable relief.

472 U.S. 810 n.3 (emphasis added).

Certification of a mandatory "injunctive" class here was fully justified, because, unlike in some consumer fraud cases, the injuries caused by the allegedly fraudulent conduct of Liberty National were largely "prospective" in the sense that they would not be experienced unless and until a policyholder contracted cancer and incurred expenses exceeding the new coverage limits for radiation, chemotherapy and prescription medication.[34] Indeed, it was questionable whether other class members, constituting 99.9 percent of the class, had experienced any out-of-pocket losses whatsoever.[35]

Moreover, a remedy to forestall future injuries had to be injunctive in nature. A monetary recovery alone, without reformation of the cancer policies of Liberty National, would not have allowed a class member to restore unlimited coverage for radiation, chemotherapy and drugs, especially because such a policy was "not generally available for purchase in the marketplace." Pet. App. 69a. The only feasible alternative was to require Liberty National to restore the benefits it had previously agreed to provide while limiting future rate increases.

At the same time, class counsel and the trial court knew that any classwide recovery of *damages* was certain

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[34] According to an affidavit filed by a Liberty National benefits administrator, only two of the current petitioners submitted claims under the new policies. *Compare* J.A. 591-92 (listing objectors who submitted claims under new policies) *with* Pet. Br. 9a-22a (listing petitioners here). Of these two objectors (Brenda Havard and Norris Woodard), only Havard received less total benefits under the new policy than under the old. *See* J.A. 593.

[35] All class members who switched to new policies paid somewhat higher premiums. Pet. App. 16a. But to establish a right to damages, they would also have to prove that they failed to receive a commensurate increase in overall insurance coverage. *See Boswell v. Liberty Nat'l Ins. Co.*, 643 So. 2d 580, 582 (Ala. 1994). Evidence developed during discovery showed that, for most insureds, that was not the case. *See, e.g.*, Pet. App. 16a, 61a-62a; J.A. 590-610, 612-19, 654-55, 662-66.

to provide only a small amount of monetary relief to each class member. This was true for several reasons. As already noted, most class members had never contracted cancer and thus had suffered little if any concrete monetary injury. *See, e.g., supra,* nn. 24, 25; Pet. App. 76a, 96a. Moreover, in a particular case, Liberty National could raise substantial defenses based, among other things, on the statute of limitations and on any disclosures about the policy changes that may have been made to that policyholder. Finally, the net worth of the defendant company was $327 million. Pet. App. 72a. As a result, "[w]ith some 400,000 named insureds (plus their additional insured family members) in the class, even an award of $1000 each would far exceed Liberty National's statutory net worth." *Id.*

These realities are reflected in the class settlement. The relief sought and won for the vast majority of the class—those who did not contract cancer prior to the settlement—was injunctive and collective. It restored all coverage previously provided in the "old" policies without eliminating any of the other benefits provided in the new policies. In addition, as ultimately approved, the settlement included a temporary freeze on premiums (despite the addition of more coverage), a requirement of common pooling for rate-setting purposes designed to minimize pressure for future rate increases, and specific limits on rate increases. Thus, the settlement not only "fixed the problem" but also provided substantial additional financial benefits.

Petitioners argue that, if allowed to opt out, they could have pursued a claim for a small amount of damages resulting from the higher premiums they had paid, plus a substantial "compensatory damages claim for mental anguish and a punitive damages claim." Pet. Br. 18. But this argument hardly serves to show that the *class action* was predominantly a damages case. Before making that determination, one would have to look, not at the relief one class member might have received in a separate

case, but at what was at stake for the class as a whole. No single individual, suing solely on his own behalf, is likely to want or be able to pursue broad injunctive relief. But if injunctive relief predominates in the remedy that would provide the maximum benefit *to the class as a whole,* then surely certification of a mandatory "(b)(2)"-type action is proper.[26] Here, as we have explained, there was a strong classwide interest in rectifying the fraudulent conduct through prospective equitable relief and no prospect of a substantial classwide award of damages.

Certainly it cannot matter that, in the absence of certification of a mandatory class including all forms of relief, some class members might have succeeded in obtaining large punitive damage awards—to the exclusion of, and potentially at the expense of, the class as a whole. No one, first of all, has a *right* to collect punitive damages. *See* Pet. App. 86a-87a; *Henderson v. Alabama Power Co.*, 627 So. 2d 878, 886 (Ala. 1993). Such relief is a discretionary remedy that may be defeated, for example, if sufficient punishment has been meted out in other cases brought by other plaintiffs against the same defendant. *See Green Oil Co. v. Hornsby*, 539 So. 2d 218, 222-23 (Ala. 1986). Moreover, here, such relief would necessarily have been limited to a small percentage of policyholders who succeeded in the "race to the courthouse," Pet. App. 77a—both because of the finite assets of the company and because of the constitutional limits on repeated punishment for a single course of conduct. *See* Pet. App. 65a-66a, 68a; J.A. 395-96. At the same time, allowing a few individuals to pursue large punitive awards would have directly harmed the interests of the class by (1) deterring Liberty National from entering into an appropriate, primarily injunctive settlement, and (2) exposing the company to financial ruin that might have destroyed

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[26] *See generally* 3B James W. Moore, *Moore's Federal Practice*, ¶ 23-40[4], at 23-278-23-281 (1996); Wright & Miller, *supra*, § 1775, at 463-70.

its ability to provide coverage *at all* for the bulk of the class. *See* Pet. App. 76a-77a.

It follows that the Due Process Clause must be interpreted as permitting state courts to determine that classwide injunctive relief is the "predominant" remedy available to and needed by the class as a whole, and to empower class counsel to negotiate or litigate to achieve the best overall package of equitable and damages relief for the class. To hold otherwise would be to decree that the interests of a small minority of class members with tenuous monetary claims stand as an obstacle to the achievement of the best possible result for the class as a whole. The trial court's finding of "predominance" in this case was unimpeachable.

III. DUE PROCESS PERMITS A STATE COURT TO CERTIFY A MANDATORY CLASS TO ASSURE THE EQUITABLE DISTRIBUTION OF POTENTIAL PUNITIVE RELIEF.

The trial court, in addition to relying on the predominantly injunctive nature of this case, certified a mandatory class based on a determination that the assets that could be pursued in individual lawsuits constitute a "limited fund." It reasoned (1) that the $327 million net worth of Liberty National could easily be depleted in individual lawsuits and (2) that the total constitutionally permissible level of punitive damages for Liberty National's fraudulent course of conduct constituted a potentially *more* limited fund likely to be used up after only a few of the class members had obtained individual judgments. *See* J.A. 395-96 (February 4, 1994 order on class certification). These rationales also provided a constitutionally valid basis for denying a right to opt out in this case—again even assuming that such a constitutional right exists in appropriate circumstances.

Both the federal and the Alabama versions of Rule 23(b)(1)(B) authorize mandatory class actions in situations where individual adjudications "would as a practical matter be dispositive of the interests of [other class members] or substantially impair or impede their ability to protecte their interests." A case involving a finite pot of available funds is an "obvious example." Wright & Miller, *supra*, § 1774, at 437 (citing cases). In such a case, of course, there would be little point in certifying a class (and no realistic chance of a class settlement) if individuals could still opt out and pursue individual claims.

Petitioners do not dispute that mandatory class actions are constitutionally permissible in limited fund cases; they instead deny that the assets of a "solvent" company like Liberty National could properly be so viewed. Pet. Br. 38. Whatever the questionable merits of that contention as a proposed rule of federal constitutional law, petitioners completely neglect the very persuasive alternative rationale adopted in the trial court. It is hard to see how the Due Process Clause could be understood to bar a state court from convening a single mandatory proceeding to allow an equitable distribution of the "limited fund" of constitutionally permissible punitive damages for a tortious policy or practice, rather than allowing such damages to go as windfalls to the first few plaintiffs who rushed into court and won favorable judgments.[27] Certainly there could be no clearer example of a case where individual adjudications have the potential to impair the ability of other plaintiffs with identical claims to win a fair share of relief.[28] And

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[27] Here, for example, it was hardly equitable for one policyholder who was not even a cancer victim to receive an award of $1 million in punitive damages. *See McAllister v. Liberty National Life Ins. Co.*, Pet. App. 136a-51a. (Indeed, in *McAllister*, plaintiff's counsel urged the jury to impose a punitive damages award for the benefit of the plaintiff herself and for the "thousands of other Ms. McAllisters" affected by the cancer exchange program, Pet. App. 60a—but did not propose to share the award with those other Ms. McAllisters).

[28] If hundreds of claims attacking Liberty National's cancer policy exchange program had been allowed to go forward as separate actions, Alabama courts and juries would have faced tremen-

states surely have a powerful and legitimate basis for seeking to address this problem through the same kind of mandatory class action that is used to distribute more orthodox "limited funds."

IV. THE COURT SHOULD NOT RECOGNIZE A CONSTITUTIONAL RIGHT TO OPT OUT OF CLASS ACTIONS INVOLVING CLAIMS FOR DAMAGES.

Even if the Court were to conclude that the primary relief at stake here was damages and that the case did not in effect involve a limited fund, it still would have no basis for holding that the denial of a right to opt out in this case was a *constitutional* violation. *First*, this Court has never held, in *Shutts*, 472 U.S. 797, or anywhere else, that the Due Process Clause confers an opt-out right on class members who are subject to the jurisdiction of the court. *Second*, history does not support the notion that there is a fundamental right to litigate damages claims on one's own, rather than in a representative suit. *Third*, there is no reason to conclude that a right to opt out is an essential element of procedural fairness that should be imposed on the states. To the contrary, states should be free to conclude that the substantial public and private costs of a right to opt out in damages cases outweigh any marginal benefits of such a right in terms of enhancing the accuracy of adjudications otherwise appropriate for class treatment.

A. Because Petitioners Do Not Deny That the Alabama Courts Had Personal Jurisdiction Over Them, the Court's Holding in *Shutts* Is Irrelevant.

The primary authority cited by petitioners for their claimed constitutional right to opt out is the *Shutts* case.

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dous difficulties in assessing appropriate and constitutionally permissible punitive awards. Each court would have needed to take account of the size of the punitive award in every *other* action, a feat that would have been nearly impossible when numerous cases were being litigated at once. Centralizing the punitive damages assessment in a single action had *overwhelming* advantages in terms of judicial administration as well as equity.

This reliance on *Shutts* is entirely misplaced. The issue in *Shutts* was whether the procedures used by a Kansas court were "insufficient to bind class members who were not residents of Kansas or who did not possess 'minimum contacts' with Kansas." 472 U.S. at 802. In the section of the opinion on which petitioners rely, the Court rejected the claim that the Kansas court had *"exceeded its jurisdictional reach"* by proposing to bind out-of-state plaintiffs to a class action damage judgment. 472 U.S. at 806 (emphasis added). The Court concluded that, in the context of "a claim for money damages or similar relief at law," due process requires states to provide an out-of-state class member, in addition to the standard procedural due process rights of adequate notice and representation, "an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court." *Id.* at 812.[29]

Petitioners nonetheless assert that the right to opt out recognized in *Shutts* was not based on concerns about personal jurisdiction after all, but instead on a broader "need to allow class members to exercise individual control over their own claims," Pet. Br. 21, even when class members are subject to the court's jurisdiction. One could reach this conclusion only by ignoring the actual language of the *Shutts* opinion, the context of the court's decision, and the body of law upon which it was based.

Observing that plaintiffs may alway consent to jurisdiction in a foreign state's courts, *see* 472 U.S. at 812, the *Shutts* Court characterized the "essential question" before it as "how stringent the requirement for a showing of consent will be" in the context of a class action for damages. *Ibid.* That showing, however, is entirely *unnecessary* when the class member resides in the forum state or has chosen

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[29] The Court's qualification that the jurisdictional opt out requirement is "limited" to actions "wholly or predominately for money judgments," 472 U.S. at 811, is a separate reason why *Shutts* cannot help petitioners here. *See supra* Part II.

to litigate there. Petitioners' interpretation of *Shutts* is also flatly incompatible with the Court's references to "the forum State," *id.* at 806, "out-of-state plaintiffs," *id.* at 806, 807, 808, the need for "minimum contacts with Kansas," *id.* at 806, 807, and 808, and "Due Process . . . protections from state-court jurisdiction," *id.* at 812—as well as with the Court's summary statement "that the Kansas court properly asserted *personal jurisdiction* over the *absent plaintiffs* and their claims against petitioner." *Id.* at 815 (emphasis added).[30] If the *Shutts* Court had meant to recognize a new constitutional right to "individual control" of litigation—a right with broad implications for federal as well as state practice, *see infra*, pp. 47-49, it would have given some sign to that effect.

Thus, properly understood, *Shutts* mandates only "that a plaintiff be permitted to opt out of a proposed class when the court does not have personal jurisdiction over the plaintiff." *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 292 (2d Cir. 1992). *See also Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553, 1560 n.8 (3d Cir. 1994); Newberg, *supra*, § 1.15, at 1-41 (*Shutts* determines the level of process that is due "in order for a court to exercise *personal jurisdiction* over *nonresident and absent class members*") (emphasis added).

Petitioners do not argue that any of them was beyond the personal jurisdiction of the Alabama courts, and understandably so. "Almost all" of the objectors are residents of Alabama, Reply Br. of Appellants (Ala. Sup.

[30] Petitioners observe (Pet. Br. 20-21) that the *Shutts* Court recognized that a "chose in action in a constitutionally recognized property interest possessed by each of the plaintiffs." 472 U.S at 807. But this merely established that the absent class members without "minimum contacts with Kansas," *id.* at 808, were entitled to *some* level of due process protection from the preclusive effect of the Kansas court's class action judgment. The mere presence of a cognizable property interest did not determine *how much* process was due even in *Shutts* itself, let alone here.

Ct.), at vii; as to them, the Alabama courts' exercise of jurisdiction was clearly constitutional. *See Pennoyer v. Neff*, 95 U.S. 714 (1877). Jurisdiction was also proper over those few petitioners who reside outside Alabama. Petitioners *intervened* in the proceedings before the trial court, *see* Brief and Argument of Appellants (Ala. Sup. Ct.), at x, and "submitted timely objections to the class certification, class notice, denial of discovery, issuance of injunction and the settlement." Pet. Br. 13 (citing J.A. 190-245). They participated fully in the fairness hearing, attacking the merits of the settlement and challenging the adequacy of class counsel's representation. In so doing, those few petitioners from outside Alabama consented to personal jurisdiction. *See DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1176 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 1544 (1996); *White v. National Football League*, 41 F.3d 402, 408 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 2569 (1995); *In re Real Estate Title and Settlement Servs. Antitrust Litig.*, 869 F.2d 760, 770-71 (3d Cir. 1989). *Shutts* is altogether inapposite here.

B. History Does Not Support the Proposition That the Right to Prosecute an Individual Action Controlled by One's Own Chosen Representative Is an Essential Procedural Protection in Cases Where Damages Are at Stake.

History also fails to support petitioners' position. Class suits generally, and mandatory class actions in particular, have a pedigree stretching back hundreds of years.[31] Be-

[31] *See* Wright & Miller, *supra*, § 1751; Stephen Yeazell, *From Medieval Group Litigation to the Modern Class Action* (1987); Raymond B. Marcin, *Searching for the Origin of the Class Action*, 23 Cath. U. L. Rev. 515, 518 (1974) (discussing *Brown v. Vermuden*, 22 Eng. Rep. 796 (Ch. 1676)); Chafee, *Bills of Peace*, *supra*, at 1317-20; William W. Blume, *The 'Common Questions' Principle in the Code Provision of Representative Suits*, 30 Mich. L. Rev. 878, 892-97 (1932). *See also* Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. Rev. 195, 203-

cause this traditional procedure has long been viewed as sufficient for adjudicating substantive rights every bit as significant and valuable as petitioners' current claims for "mental anguish and punitive damages," Pet. Br. 18, 23, there is no basis for holding it unconstitutional. *See, e.g., Pacific Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1, 17 (1991); *Sun Oil Co. v. Wortman,* 486 U.S. 717, 730 (1988).

Petitioners contend that our legal traditions recognize a fundamental right to individualized adjudication at least as to legal claims for damages. But, in fact, there are many venerable examples of monetary claims, including damages claims, that were adjudicated by means of a non-opt-out class action. Mandatory class actions "involving monetary claims were adjudicated in equity as a matter of course from early times." Zechariah Chafee, Jr., *Some Problems of Equity* 285 (1950). Well over a hundred years ago this Court ruled—in a case involving monetary claims against a church by secessionist ministers—that

> [w]here the parties are very numerous, and though they have or may have separate and distinct interests, yet it is impractical to bring them all before the court. . . . the decree [in a class action] binds all of them the same as if all were before the court. The legal and equitable rights and liabilities of all being before the court by representation, and especially where the subject-matter of the suit is common to all, there can be very little danger but that the interest of all will be properly protected and maintained.

Smith v. Swormstedt, 57 U.S. (16 How.) 288, 302-03 (1854) (citing J. Story, *Equity Pleadings*). And the fact that these cases were in equity, whereas the law courts maintained more restrictive rules of party practice,[32] is of little moment for purposes of determining what the principles of *due process* require. The Fourteenth Amendment does not enact common-law joinder rules; nor does it limit equitable procedures to their historic realm.[33]

Petitioners' attempt to distinguish the early class actions resolving monetary claims as "limited fund" cases, Pet. Br. at 36, "seiz[es] upon their accidental limitations rather than their underlying principle of relief." Chafee, *Bills of Peace, supra,* at 1320. The Court's approval of the class device in *Smith v. Swormstedt,* for example, rested not on any mechanical classification by type of suit but instead on the Court's determination that class treatment would be both fair (to the absentees) and efficient. *See* 57 U.S. (16 How.) at 302-03. The same conclusion is warranted here.

It is telling that petitioners do not rely on any authority directly espousing their claimed fundamental right to "individual control" over litigation of damage claims. Instead, they rest on the premise that the opt-out rights under the first two incarnations of the Federal Rule 23 must reflect constitutional minima. *See* Pet. Br. 35-38.[34]

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32 (1992) (surveying the long history of various doctrines of "virtual representation" in English and American law).

[32] Class actions were originally not cognizable at law because of "rigid common law rules discouraging joinder of parties inherited from England" and because "the procedural machinery of the law courts was not well adapted to protect the rights of unknown, unnamed, or nonparticipating persons." Wright & Miller, *supra,* § 1751, at 11. With the merger of law and equity, however, the "equity class action practice was incorporated into the procedural codes of numerous states," most of which "provided that when the question in dispute involved a common or general interest of many persons *or* when the group was so numerous that it would be impracticable to bring them all before the court, representatives of the class might sue or defend for the benefit of all." *Id.* (footnotes and citations omitted).

[33] The Seventh Amendment, unlike the Due Process Clause, makes traditional common-law practice its explicit benchmark. But even the Seventh Amendment has not been read to preserve all the technical features of the common law. *See Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 336 (1979).

[34] Petitioners (Br. at 37 n.16) selectively quote from the 1966 Amendments Advisory Committee Notes to give the impression

Such a premise is unwarranted. The history of the class action, before Rule 23 was adopted and since, shows that personal prosecution of claims has not been viewed as an indispensable ingredient of procedural fairness. That history also shows that the representative suit has evolved and adapted itself to new conditions and new categories of cases. *See, e.g.*, Wright & Miller, *supra*, §§ 1751-53. A constitutional ruling that treated present federal procedural rules as declaratory of the rudiments of fundamental fairness would arrest that evolution, and would be inconsistent with this Court's recognition that the due process is a distinctively flexible concept that readily accommodates changing circumstances. *E.g., Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 320 (1985); *Mathews*, 424 U.S. at 334; *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886, 895 (1961); *Griffin v. Illinois*, 351 U.S. 12, 20-21 (1956) (Frankfurter, J., concurring in judgment). As Judge Marvin Frankel wrote in reference to the 1966 Amendment to Federal Rule 23:

> There is nothing magic or constitutionally vital about the "true" class action or *in rem* proceedings except that the terms and their implications are matters of old hat for us. Underlying those familiar concepts are familiar notions of necessity or convenience or "practicability" weighed with or against basic principles of fairness. Such notions are flexible and adaptable to the emerging needs of an increasingly complex community. They may be sensibly and justly applied in ways that will make it entirely fair to render judgments "binding" upon absent parties in actions that were formerly . . . non-binding.

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that the Committee was of the view that a right to opt out is constitutionally required in damages cases. In fact, the Committee merely pointed to cases generally setting forth the basic requirement of reasonable notice in class actions, and did not suggest that the right to opt out in damages actions was constitutionally required. *See* 1966 Amendment Advisory Committee Notes, Subdivision (d)(2).

Marvin E. Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 46 (1967) (footnote omitted).

The long history of representative suits simply does not support the proposition that there is a right of individual control over damages claims, even where those claims would otherwise be suited for adjudication in a class action.

C. The Balance of Private and Public Interests Affected Does Not Support Recognition of a Right to Opt Out of a Properly Certified Plaintiff Class.

Petitioners are on no firmer ground in arguing that a constitutional right to opt out is mandated by the balancing test set forth in *Mathews*, 424 U.S. 310.[35] A fair application of *Mathews* leads to the opposite conclusion: in view of the other protections for class members built into the class action process—including court certification of the class definition and representatives, court review of any negotiated settlement after notice to all class members, and a due process right to demonstrate inadequate representation in a subsequent lawsuit—a right to opt out simply is not essential to ensure procedural fairness.[36]

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[35] The familiar *Mathews* test requires consideration of (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest [by the Government] through the procedures used, and the probable value, if any, of additional or substitute safeguards,"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." 424 U.S. at 335. In *Connecticut v. Doehr*, 501 U.S. 1, 11 (1991), the Court adjusted this test to fit a dispute among private litigants, holding that in that context the interests of the private party opposing the disputed procedure merit "principal attention."

[36] Petitioners' discussion of the *Mathews* factors rests largely on an (unsuccesful) effort to show that the result in this particular case was unfair. *See* Pet. Br. 22-35. But one cannot make out a

1. *The Interests of Class Members Opposing Inclusion in a Mandatory Class.*

Because individuals have property interests in state causes of action, due process requires that the procedures followed in adjudicating these causes of action be consistent with fundamental fairness. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-29 (1982). In claiming a right to opt out, however, petitioners are not seeking the basic elements of due process—"notice and an opportunity to be heard," *United States v. James Daniel Good Real Property*, 114 S. Ct. 492, 498 (1993); *see Logan*, 455 U.S. at 433-34—protections they received *in abundance* in this case. Instead, they assert a distinct interest, sounding more in "liberty" than "property," in *control* over the adjudication of certain legal claims—specifically (1) the ability to choose their own *forum* and (2) the ability to select and control their own preferred *representative*.

Neither of these interests merits great weight in the constitutional balance. To the contrary, as long as a state provides a fair process for enforcing a cause of action, it should have great leeway to decide what particular procedural mechanisms—such as an individually prosecuted lawsuit—should or should not be available. "State courts are generally free to develop their own rules for protecting against the relitigation of common issues or the piecemeal resolution of disputes," *Richards v. Jefferson County*, 116 S. Ct. 1761, 1765 (1996); the Due Process Clause does not make this Court the " 'rule-making organ for the promulgation of state rules' " of *civil* procedure any more than it does in the criminal context. *See Medina*

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due process claim merely by showing that *valid* procedures were misapplied in his particular case; as the Court said in *Mathews* itself, "procedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases." 424 U.S. at 344.

v. California, 505 U.S. 437, 443-44 (1992) (quoting *Spencer v. Texas*, 385 U.S. 554, 564 (1967)).

As to choice of forum, there are any number of situations—beyond the various kinds of mandatory class actions petitioners must concede are constitutional—in which the law requires that a claim or class of claims be adjudicated at a single time and place. That is the essence of a bankruptcy proceeding. Other examples abound in the rules governing federal civil litigation. *See* 28 U.S.C. § 1404 (change of venue for convenience of parties and witnesses); *id.* § 1407(a) (multidistrict litigation); Fed. R. Civ. P. 19(a) (compulsory joinder), 22 (interpleader), 42 (consolidation). *See generally* Judith Resnick, *From "Cases" to "Litigation"*, 54 Law & Contemp. Probs. 5, 26-36 (1991). The plain fact is that due process has never been understood to guarantee a right to select the timing and the forum for adjudication of a claim.

The second interest asserted by petitioners—the interest in choosing and controlling one's legal representative—is perhaps more substantial. But it is far from absolute.[37] This Court has held that the interest in individual selection of counsel can be outweighed by substantial government interests, even when the result was to preclude claimants from proceeding with counsel at all. *See Walters*, 473 U.S. 305.[38] Moreover, the interests in selecting one's own representative and pursuing a civil case *solo*

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[37] Many aspects of the litigation process, beginning with the doctrine of *stare decisis*, require a litigant to live with results obtained by others who were not his chosen agents in fora not of his choosing. *See Developments in the Law-Class Actions*, 89 Harv. L. Rev. 1318, 1349 (1976) ("Once the influence of precedent upon litigation of common questions is considered, the distinction rule 23 draws between (b)(1) and (b)(3) class suits becomes tenuous.").

[38] Members of a mandatory class, of course, are free to obtain their own lawyers for purposes of intervening and contesting adequacy of representation and the other prerequisites for class relief,

deserve the least weight in the class action context, where the adequacy of the representation provided by the court-appointed representative is supervised by the trial court (subject, in Alabama and the federal courts, to appellate review) and can be collaterally attacked in subsequent litigation as well. That is why it is permissible—as petitioners apparently concede—to deny class members a right to select their own representatives in cases involving injunctive claims, which frequently involve rights every bit as important to an individual as any damages claim.[39]

Moreover, many commentators have observed that an individual's practical ability to control litigation of his claim is in reality very limited in the context of the very claims that are subject to class action treatment. *See generally* Deborah R. Hensler, *Resolving Mass Toxic Torts: Myths and Realities*, 1989 U. Ill. L. Rev. 89, 92-97. As Judge Spencer Williams put it, "[a]lmost everyone who has had contact with plaintiffs of tort litigation at the trial court level would admit that, ultimately, everyone and everything *but* the injured plaintiff controls the litigation." Spencer Williams, *Mass Tort Class Actions: Going, Going Gone?*, 98 F.R.D. 323, 330 n.23 (1983). "[I]ndividual plaintiffs have weak to nonexistent

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as petitioners did here, and in a collateral attack on a class action judgment.

[39] Petitioners have no explanation for why the Constitution should be read to *require* opt-out rights in damages cases, even though mandatory classes are certified as a matter of course in cases seeking equitable relief, including monetary relief such as backpay. *See* Moore's Federal Practice ¶ 23.40[4], at 279 (citing myriad class actions under Federal Rule 23(b)(2) seeking awards of backpay); Newberg, *supra*, § 4.14. The answer cannot be the risk of inconsistent equitable decrees, since many forms of equitable relief (including backpay) could easily be awarded on an individualized basis. Indeed, because the value of a dollar is roughly the same to different individuals, one might expect to find any fundamental right to "control" in the context of lawsuits seeking relief *other than* money.

control over their attorneys across the mass tort context for reasons that are inherent to the economics of mass tort litigation. Accordingly, proposals for the return to a traditional system of individual case litigation are apt to be as quixotic as they are costly." John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Column. L. Rev. 1343, 1346 (1995).

As the trial court below recognized, *e.g.*, Pet. App. 68a, the objectors' fundamental quarrel with the class settlement here was that it foreclosed the possibility of large individual punitive damage awards in subsequent actions. Whatever incremental value there may be in individual control of claims for compensatory damages—and given existing protections for unnamed class members, it is slight—that value dissipates completely when the claim is for punitive damages. Especially in the context of a tort affecting hundreds of thousands of victims, no single person has an entitlement to or reasonable expectation of a sizeable punitive award. *See* Pet. App. 51a. An interest in individualized prosecution of punitive damage claims would amount to an interest in jumping ahead of other plaintiffs to grab an unequal or exclusive share of a bounty collected for the sole purpose of benefiting society at large. Such an interest is entitled to no weight in the due process balance.

2. *The Incremental Value of the Additional Procedure in Protecting Class Members' Interests.*

The Due Process Clause does not mandate procedures for their own sake, but only as necessary to reduce to tolerable levels the risk of erroneous deprivation of a protected interest. *See, e.g., Walters*, 473 U.S. at 327-33.[40]

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[40] *See Dixon v. Love*, 431 U.S. 105, 114 (1977) (concluding under *Mathews* that a predeprivation hearing was not required for revocation of traffic license; observing that "a [personal] appearance might make the licensee feel that he has received more personal attention, but it would not serve to protect any substantive rights"

Petitioners, however, make no effort to show that individuals are on balance more likely to attain favorable *results* as individual plaintiffs than as members of a properly certified class.[41] Instead, petitioners ultimately seek to justify their claimed right to "control" damages litigation, not as a *means* of protecting their property interests, but as an *end* in itself.[42]

A right to opt out cannot be seen as an essential for achieving fair and accurate results in civil litigation. Other protections afforded unnamed class members in Alabama are sufficiently comprehensive that little or no *incremental* protection would be afforded by an across-the-board right to opt out in damages cases. Class action rules such as Alabama's Rule 23 in effect impose on the trial court the duty to substitute its supervision for the individual control that would be exercised in another type of case.[43] Like the federal rule, Alabama's Rule 23

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and was "unlikely to have significant value in reducing the number of erroneous deprivations").

[41] Such a showing would be difficult to make. *See, e.g.*, Michael J. Saks & Peter David Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts*, 44 Stan. L. Rev. 815, 815 (1992):

> In fact, aggregation adds an important layer of process which, when done well, can produce more precise and reliable outcomes. Paradoxically, the procedural innovation of aggregation provides a quality of justice that surpasses what courts have, until now, been capable of providing in any kind of case.

Empirical findings draw into question the efficacy of *non-class* litigation at compensating tort victims in a consistent and fair manner. *E.g.*, Hensler, *supra*, at 100-04 (surveying research). Moore's Federal Practice ¶ 23.40[4], at 279 (citing myriad class

[42] Here, Petitioners' argument reveals its true colors as a disguised version of their *jury trial* argument in the Alabama Supreme Court, where they decried "the destruction of *substantive* constitutional rights *just because the 'correct procedure' may have been followed.*" Reply Brief at 5 (emphasis added).

[43] *See Gulf Oil Co. v. Bernard*, 452 U.S. 89, 100 (1981). As this Court remarked in *Shutts*, "from the plaintiffs' point of view, a

requires the court first to determine that there are "questions of law or fact common to the class," that the representative's own claims are "typical of the claims . . . of the class," and that the representative "will fairly and adequately protect the interests of the class." Ala. R. Civ. P. 23(a)(2), (3), (4). And class members *already* have a right to file their own lawsuit in those instances where they can show that the array of protections for class members has failed and they have been denied adequate representation. *Hansberry v. Lee*, 311 U.S. 32 (1940).

In addition, and of particular relevance here, in the case of a proposed settlement, the court must determine, after adequate notice to the class and opportunity to present objections, that a proposed settlement of a class action is "fair, adequate, and reasonable." *See* Pet. App. 23a (citations omitted); *see also* Ala. R. Civ. P. 23(e). Here, the trial court's painstaking review of and extensive modifications to the settlement, coming after objectors had extensive opportunities to participate and object, stand as a model of judicial solicitude for unnamed class members' interests.[44]

Nor can it be contended that claims for damages are somehow inherently unsuited for mandatory class treatment. *See* Chafee, *Bills of Peace*, *supra*, at 1329 & n.110 (observing that "often damages can be assessed mechanically") (footnote omitted). When it is possible for the trier of fact to adjudicate liability and to compute damages reliably, there is no reason why due process should preclude a court from entertaining a mandatory class

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class action resembles a 'quasi-administrative proceeding, conducted by the judge.'" 472 U.S. at 809 (quoting 3B J. Moore & J. Kennedy, Moore's Federal Practice, ¶ 23.45[4.-5.] (1984)).

[44] Petitioners suggest (Pet. Br. 28 n.14) that if the Court rejects their opt out claim, it should proceed to determine whether they were adequately represented *in this case*. But that issue was not presented in the petition for certiorari. Moreover, there is no support for petitioners' claims of unfair treatment.

action. By contrast, when substantial differences among plaintiffs' injuries, or other legal or factual asymmetries, make a unitary determination of a claim for damages *in*feasible, existing law (in Alabama, as under the Federal Rules) already requires the court to take steps to protect class members' individual interests—either by denying class certification entirely, Ala. R. Civ. P. 23(a), by limiting the scope of the class action to genuinely common issues, *id.* 23(c)(4)(A), by creating subclasses, *id.* 23(c)(4)(B), or by establishing individual claims adjudication procedures once common issues have been litigated, *e.g.*, Coffee, *Class Wars*, 95 Colum. L. Rev. at 1439-44.[45]

A constitutional ban on adjudicating damages claims on a mandatory class basis would deprive states of a useful procedural device even in cases where damages *are* determinable in a single proceeding, without materially improving upon the protections provided by existing law for damage claimants whose claims require individualized determination. Indeed, because petitioners' proposed constitutional rule is based on a peremptory right of the individual plaintiff to "control" his suit for damages, rather than on any practical concern with administrability or proof, it would bar states from certifying a mandatory class for the *liability* phase of an action in which damages are sought, even though the same proceeding could be conducted on a mandatory basis in a case seeking an equitable remedy. Such a rule is not even sensible, let alone compelled by considerations of fundamental fairness.

Provisions allowing individuals to "opt out" of a class are themselves a valuable procedural tool (among other things, as *Shutts* recognizes, the opt-out procedure can be used to obtain consent to jurisdiction from out-of-state class members without minimum contacts). But, contrary

[45] The settlement in this case provides for such an individualized determination of the restitution and supplemental monetary relief due cancer victims. *See* J.A. 144-50.

to the suggestions of petitioners and their *amici*, a constitutional right to opt out of any class action for damages is scarcely the cure for the problems of unfairness that mandatory class actions, especially class action settlements, can sometimes pose for unnamed plaintiffs.[46] Petitioners, for example, suggest that an opt-out right would be an appropriate means of policing conflicts of interest by class counsel. Pet. Br. 27-28 & n.14. But meaningful enforcement of the existing constitutional requirement of adequate representation, *see Hansberry*, 311 U.S. 32; Ala. R. Civ. P. 23(a)(4), and courts' authority to certify subclasses, Ala. R. Civ. P. 23(c)(4)(B), provide far more direct and effective means of preventing divided loyalties by class counsel.[47] Similarly, existing procedures, notably the requirements of adequate representation and substantive review of settlements, provide courts with ample procedural means of preventing "collusive" settlements (an allegation the trial court here properly rejected, *see* Pet. App. 34a-36a).

In sum, the opt-out right petitioners seek offers little or nothing that existing mechanisms do not already offer in terms of protecting the interests of absent plaintiffs, and would be a distinctively awkward and costly instrument for attempting to "reform" class action practice.

3. *The Interests of Private Parties Opposing the Requested Procedure.*

The interests of plaintiffs who wish to litigate as a class and of defendants seeking protection from duplicative

[46] *See, e.g.*, John C. Coffee, Jr. *The Corruption of the Class Action: The New Technology of Collusion*, 80 Corn. L. Rev. 851 (1995); Susan P. Koniak, *Feasting While the Widow Weeps:* Georgine v. Amchem Products, Inc., 80 Corn. L. Rev. 1045 (1995).

[47] By contrast, an opt-out rule (available only for damages actions) would scarcely be an effective means of protecting absent class members from attorneys with divided loyalties—class members whose claims are too small to warrant separate adjudications are unlikely to opt out of a suit regardless of whether or not class counsel has a conflict.

lawsuits point decidedly against recognition of a due process right to opt out. These private interests, no less than the private interests of those who seek the opt-out right, merit due weight on the *Mathews* scale. *See Doehr*, 501 U.S. at 11.

Defendants possess a strong interest in avoiding the burdens of numerous, simultaneous lawsuits stemming from a single alleged wrong. The sheer cost of piecemeal litigation is likely to consume a great deal of the defendant's resources; funds that might otherwise be spent on compensating parties are likely to be directed instead to defending individual lawsuits. Indeed, "today transaction costs and legal fees appear to account for more of defendants' total expenditures than do payments to victims." Coffee, *supra*, 95 Colum. L. Rev. at 1441.

Moreover, as this case pointedly illustrates, allowing opt-out rights for individual class members can severely impair the interests of the class as a whole. The trial court found that if individual policyholders were permitted to pursue damage claims on their own behalf, the result would be a punitive damages windfall for a few plaintiffs, coupled with *no recovery whatsoever* for the vast majority of policyholders affected by the defendants' actions (and the prospect that it would not be able to continue to provide coverage). *E.g.*, Pet. App. 77a. It would be strange indeed if the Due Process Clause were interpreted to mandate a procedure almost certain to leave most holders of the protected property interest worse off than they would be without it.

4. *Governmental Interests in Proceeding by Mandatory Class Action.*

As this Court has recognized, *e.g.*, *Gulf Oil Co.*, 452 U.S. at 99; *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979), class action procedures serve substantial governmental interests in the efficient, expeditious, and fair resolution of disputes and in the efficient use of the court

system. Mandatory class actions for damages serve these public interests every bit as much as do mandatory class actions for other kinds of relief. The costs of banning them in every state and federal court in the Nation, as petitioners propose, would be correspondingly high.

It is no secret that "mass" litigation has imposed an enormous strain on crowded federal courts and the often even more crowded state court systems. Class actions generally, and mandatory class actions in particular, are one particularly direct and effective response to this problem. The state's interest in providing meaningful civil justice to litigants whose cases *cannot* be resolved on a consolidated basis weighs heavily against recognition of a constitutional right to "individual control" of jointly triable claims. *See* Jon O. Newman, *Rethinking Fairness: Perspectives on the Litigation Process*, 94 Yale L.J. 1643, 1644 (1985) (calling for "a broadened concept of fairness" that "includes fairness not only toward the litigants in an individual case but also to all who use or wish to use the litigation system and to all who are affected by it").

Mandatory class actions, moreover, promote the strong public interest in settlement of legal disputes by reducing the transaction costs of negotiating with multiple parties (here, numbering in the hundreds of thousands).[48] Assured of certain and final resolution of claims against it, a defendant may be willing to pay out more in terms of actual benefits to the plaintiff class than it would be willing to pay if faced with the massive expense of also litigating many individual cases. At a time when docket crowding, fueled in large part by various kinds of "mass" litigation, already threatens state and federal courts' practical ability to resolve civil (and criminal) disputes in a

[48] This Court has recognized that settlement of legal disputes promotes substantial public and private interests. *See U.S. Bancorp Mortg. Co. v. Bonner Mall Partnership*, 115 S. Ct. 386, 392 (1994); *Marek v. Chesny*, 473 U.S. 1, 10 (1985).

timely fashion, the Court should be extremely hesitant to embrace a new *constitutional* rule that would exacerbate this problem, and foreclose innovative means of redressing it.

Absent a sudden reversal of the long-range economic and social developments driving the movement from "cases" to "litigation," *see* Resnick, *supra,* even the suggestion of a fundamental, meaningfully enforceable right to "individual control" of jointly triable claims may soon prove wildly unrealistic. Given that a variety of other means exist to ensure that the inevitable evolution toward claim aggregation unfolds consistently with basic fairness, recognizing a constitutional right to opt out would be improvident.

Indeed, one of the most prominent advocates of the interests of unnamed plaintiffs has observed that "[a]ny serious effort at a balanced solution to the mass tort crisis must recognize that federal courts *can no longer afford* every litigant in mass torts case an individual trial." Coffee, *supra*, 95 Colum. L. Rev. at 1439 (emphasis added).[49] Many proposals for reform of existing class action procedures would seek to combine the efficiency of mandatory classes with innovative procedural devices designed to ensure fair treatment of all class members.[50]

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[49] Hensler, *supra*, at 89-90 ("[A] consensus has now emerged calling for substantial modification in traditional court processes to improve the efficiency and equity of the mass claims resolution process.").

[50] *See, e.g.*, Coffee, *Class Wars*, 95 Colum. L. Rev. at 1439 (endorsing "limited class actions" with class-wide determination on issues of liability and general causation and individual trials or arbitrations on issues of damages or individual causation); Robert G. Bone, *Rule 23 Redux: Empowering the Federal Class Action*, 14 Rev. Litig. 79, 102-03 (1994) (discussing proposed amendments to Rule 23 and proposing new device for resolution of small-scale damage claims without opt-out right); Saks & Blanck, *Justice Improved*, 44 Stan. L. Rev. at 841-50 (endorsing techniques for resolving mass tort claims by averaging results of a subset of "sample" trials); Resnick, *From "Claims" to "Litigation"*, 54 Law & Contemp. Probs. at 39-49 (discussing American Law Institute proposals to facilitate aggregation of claims); David Rosenberg, *The Causal Connection in Mass Tort Exposure Cases: A "Public Law" Vision of the Tort System*, 97 Harv. L. Rev. 851, 908-24 (1984) (discussing various possible mechanisms for resolving mass claims on consolidated basis).

The right petitioners now seek to elevate to constitutional status would rule out such potentially salutary means of reconciling efficiency with equity.

In conclusion, the private and public interest factors identified in *Mathews* and *Doehr* argue overwhelmingly *against* recognition of the broad new rule of constitutional civil procedure petitioners ask this Court to promulgate.

CONCLUSION

The judgment of the Alabama Supreme Court should be affirmed.

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